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Nos. [redacted] and [redacted]

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OCTOBER TERM, [redacted]63

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,

Petitioner,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C. A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DuPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND FIFTH CIRCUITS

MEMORANDUM FOR RESPONDENT, SILVIO GUTIERREZ, RESPECTING MOOTNESS AND IN OPPOSITION TO PETITIONER'S SUGGESTION OF DEFERRAL OF CONSIDERATION

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The issue in these cases actually is whether, in the absence of an authorizing statute, a court has the power to order the taking of pre-trial depositions in aid of extradition. The Court of Appeals for the Second Circuit held that under the circumstances revealed by the record, the

court lacked such power and that the demanding state had no need for these depositions and quashed subpoenae *duces tecum* issued in purported aid thereof (274 F. 2d 206; cf. *Miner* v. *Atlass*, 363 U. S. 641).*

As stated at page 4 of petitioner's memorandum, it has since been held that the evidence submitted on behalf of the petitioner was in fact sufficient to justify extradition and a final order to that effect has been entered in the extradition proceedings from which, concededly, there is no appeal (*Collins* v. *Miller*, 252 U. S. 364).

The conjectural possibility that there may be resort to *habeas corpus* proceedings by the accused can, at best, involve only the questions of jurisdiction; whether the offense charged is within the treaty and whether there was any evidence at all upon which a finding could have been made that there was reasonable ground to establish the criminality of the accused for extradition purposes. The number of the charges in the indictment is immaterial if the accused was tried upon one of the charges for which he is to be surrendered. (*Fernandez* v. *Phillips*, 268 U. S. 311; *Ex Parte Bryant*, 167 U. S. 104). This Court has held that the weight and effect of competent evidence will not be considered upon a writ of *habeas corpus*, which can not perform the office of an appeal or a writ of error. (*In re*

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* Judge Albert B. Maris, in an article on "Federal Procedural Rule-Making" (47 A.B.A. Journal 772, 775) describes the necessity which arose for this Court to promulgate new rules under its Congressional authority "resulting from the decision of the Supreme Court in *Miner* v. *Atlass* holding invalid the local rules of many district courts which had authorized depositions and discovery procedure in admiralty cases."

Luis Oteiza & Cortes, 136 U. S. 330; *Grin* v. *Shine*, 187 U. S. 181).

The petitioner has never claimed that the depositions sought were needed to establish jurisdiction or the criminality of the accused for extradition purposes and the court below determined that the evidence sought would be "merely cumulative" (Appendix 1, p. 17). Accordingly, the questions heretofore sought to be reviewed by this Court cannot properly be involved in any future *habeas corpus* proceeding or any remand that may be directed therein, and these appeals have become abstract and moot.

Even assuming a future reopening or renewal of the extradition proceeding, it is impossible to say what the controversy or adverse interests would then be or whether these appeals would even be germane to the issues then remaining, and the retention of these cases by this Court for such eventuality would necessarily be premised upon wholesale conjecture and speculation.

Walling v. *Helmerich & Payne*, 323 U. S. 37, relied upon by the petitioner, is utterly inapplicable and stands only for the proposition that where there is a controversy over the legality of an activity which is sought to be restrained or punished, the voluntary discontinuance of such activity does not necessarily remove the case from the ambit of judicial power. There is no similarity whatever between the legal situation involved in that case and that which is involved in the cases at bar.

Here, the entry of a final and non-appealable order, which has terminated the quasi-judicial extradition proceedings formerly pending when certiorari was granted, has certainly rendered abstract the question of the right to

a pre-trial deposition for use in a proceeding already litigated, adjudicated and terminated. The cases at bar, therefore, do not present an actual controversy and they should be dismissed as moot.

Respectfully submitted,

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